

MAHROUS (Migration) [2021] AATA 2821 (7 July 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Ehab Mohamed Moustafa Kamal MAHROUS

CASE NUMBER: 1911957

HOME AFFAIRS REFERENCE(S): BCC2019/1775365

MEMBER: Hugh Sanderson

DATE: 7 July 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Medical Treatment (Visitor) (Class UB) visa.

Statement made on 07 July 2021 at 4:18pm

CATCHWORDS

MIGRATION – Medical Treatment (Visitor) (Class UB) visa – Subclass 602 (Medical Treatment) – medically unfit to depart Australia and genuine intention to remain temporarily – long residence and other visa refusals, reviews and appeals – limited treatment for mental health issues, and continuing work – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cl 602.215

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 2 May 2019 to refuse to grant the applicant a Medical Treatment (Visitor) (Class UB) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 10 April 2019. At that time, Class UB contained one subclass, Subclass 602 (Medical Treatment). The criteria for the grant of this visa are set out in Part 602 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The delegate refused to grant the applicant the visa because the delegate was not satisfied that the applicant was medically unfit to depart Australia and was not satisfied the applicant genuinely intended to remain in Australia temporarily and therefore did not meet the criteria in cl 602.215.

Background

4. The applicant is a citizen of Egypt and is currently 35 years old. He first arrived in Australia on 7 August 2007 holding a Student visa. He was granted a further series of Student visas, the last one expiring on 30 March 2012. Apart from two months in 2010, he has not departed Australia.
5. The applicant applied for a Protection visa on 23 March 2012. That application was refused by the Department on 29 June 2012. The applicant withdrew an application for a review of that decision before the Tribunal on 27 May 2013.
6. The applicant applied for a Partner visa on 20 June 2013. That application was refused by the Department on the basis that the applicant did not meet the Schedule 3 criteria and there were not compelling or compassionate circumstances for not applying that criteria. That decision was affirmed by the Tribunal (differently constituted) on review. The applicant made two successful appeals against the decisions of the Tribunal with the Tribunal on each time it was remitted to it affirming the Department's decision. On the final occasion, the applicant's appeal to the Full Federal Court was dismissed on 29 November 2018. The applicant then applied for Ministerial Intervention which was noted as being not referred on 22 February 2019. The applicant then applied for the current visa on 10 April 2019.
7. In his application, the applicant claimed that he was suffering from adjustment disorder, mixed anxiety and depressed mood. He provided a letter from Dr Mahmoud Abu-Arab, clinical psychologist, dated 1 April 2019 stating that he was treating the applicant for this condition as a result of his concern of returning to Egypt. The applicant sought to be able to remain in Australia to continue his treatment until 19 March 2020.
8. The delegate who considered the application noted the following:
 - There was no information which indicated the applicant was gravely ill or receiving intensive or critical care which required him to remain in Australia;
 - There was nothing to indicate the treatment the applicant was receiving was unavailable outside Australia;
 - There was no information which would indicate the applicant had any incentive to depart Australia;

- The applicant's immigration history indicated that he has made multiple applications to be able to remain in Australia which had been unsuccessful and he has exhausted all other attempts to remain in Australia;
 - There were no personally compelling or exceptional circumstances to warrant a departure from the requirement that the applicant genuinely intends to remain temporarily in Australia; and
 - It appeared that the applicant was utilising the Medical Treatment visa in order to maintain ongoing residence in Australia and that he does not genuinely intend to remain temporarily in Australia.
9. Taking these matters into account, the delegate found that the applicant was capable of departing Australia and that he did not genuinely intend to remain temporarily in Australia. The delegate found the applicant did not meet the criteria in cl 602.215 and refused the application.

Information to the Tribunal

10. The applicant provided further documents in support of his application including the following:
- Submissions in support of the application;
 - Report from Dr Abu-Arab dated 7 December 2018;
 - Report from Dr Abu-Arab dated 21 June 2021; and
 - Death certificate of the applicant's father with the death occurring on 26 December 2020.
11. In the submission of the applicant the following was claimed:
- The applicant's health has deteriorated due to the failure of his marriage;
 - The applicant's father died on 26 December 2020 due to complications arising from a COVID-19 infection;
 - The applicant is suffering from depression due to feelings of guilt due to being unable to farewell his father during his medical deterioration and funeral; and
 - The applicant needs further treatment to help him overcome feelings of sadness.
12. The applicant appeared before the Tribunal by MS Teams video on 6 July 2021 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.
13. The applicant said that he had been living in a home at Bella Vista since the end of 2016. He was a tenant there living with a family who owned the house. He spent a short time living with friends in Guildford when he was not able to pay the rent. Prior to this, he had been living in Bankstown with friends for about four or five months.
14. The applicant said that he had currently two casual jobs; one as a cleaner and one as a forklift driver. He said that he was very successful with his work and was a good worker. He showed a certificate for winning 'worker of the month' from one of his employers. He said

that whenever he had work rights he was able to find work. He said that he was working two or three or five days a week.

15. The Tribunal asked the applicant when he stopped living with his wife. He gave a confused and inconsistent answer. He said that when he was living at Bella Vista the people there told him that his wife could not visit because they did not trust her. He said that she last visited him at Bella Vista in 2018. He said that she would spend two or three days a week with him. He said that he stopped living with her permanently in 2015. He said the relationship ended because he had no idea that she was taking alcohol and drugs and had to go to hospital at times and when he found this out the relationship ended.
16. The applicant said that his mother, two sisters and brother continue to live in Egypt. He said that his brother lives with his mother and his two sisters are working.
17. The applicant said that he had seen Dr Abu-Arab on one occasion over the last 12 months. He said that this was done after the Tribunal had invited him to attend the hearing. He said that in the beginning in 2016 he had seen Dr Abu-Arab every month but not much since then and since the beginning of 2020 he had only seen him once.
18. The applicant said that he had only seen his doctor on one occasion over that period due to the coronavirus shutdown. He said that he had to do consultations by phone and would ring up to make appointments. The Tribunal noted that the coronavirus shutdown was only for a limited period and that if he was suffering from any medical condition he would have been able to have seen a medical practitioner over that period. The applicant said that he was so sick that he could not even bring himself to see his doctor.
19. The Tribunal noted that although the applicant was claiming he had telephone consultations with his doctor, this was not mentioned in any report. The applicant said that he had only contacted his doctor once over the last 12 months but had now made a booking to see his doctor at the end of August 2021. He said that his GP gave him a referral which lasts for 12 months and so he did not need to make a booking.
20. The applicant said that he started seeing his doctor in January 2016 and had always made appointments to see him. He said that he had continuing problems when he found out that his wife was using drugs and was going to hospital and this caused him to suffer from depression. He said the death of his father and the coronavirus pandemic also made him feel helpless and stopped him from being able to see his doctor. He said that he just wanted to keep working to pay off his debts and working was the treatment that was best for him.
21. The applicant said that work for him is important as it takes away all his stress. He said that he was not able to work in Egypt and that all he needed to do was to work. He said that if he went back to Egypt he would not be able to pay off his debts and his work is his first priority as it takes his anxiety away from him.
22. For the following reasons, the Tribunal has decided that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

23. The Subclass 602 Medical Treatment visa is for persons seeking to visit or remain in Australia temporarily for medical treatment or related purposes. The issue in this case is whether the applicant is medically unfit to depart Australia and, if he is not, whether he genuinely intends to remain in Australia temporarily for the purpose of the visa.

Is the applicant unfit to depart Australia?

24. An applicant is required to meet the criteria in cl 602.215 unless they meet the criteria in cl 602.212(6). Clause 602.212(6) relates to an applicant being medically unfit to depart Australia. It requires that the applicant:
- is in Australia;
 - has turned 50;
 - has applied for a permanent visa in Australia and appears to have met all the criteria for that visa other than the health criteria but has been refused the visa; and
 - is medically unfit to depart Australia due to a permanent or deteriorating disease or condition evidenced in writing by a Medical Officer of the Commonwealth.
25. The applicant is 35 years old. There is no information that would indicate the applicant has applied for any other visa to be able to reside in Australia or that he would be eligible to apply for any other visa to remain in Australia. Accepting the claims made by the applicant as to the medical condition he claims to be suffering from at its highest, there is nothing to indicate that any condition the applicant is suffering from would make him medically unfit to depart Australia. He has shown himself to be able to work while he has been in Australia.
26. Given the above findings, the requirements in cl 602.212(6) are not met. Accordingly, the applicant is required to meet the criteria in cl 602.215(1) and the exemption in cl 602.215(2) does not apply.

Does the applicant have a genuine intention to stay temporarily for the visa purpose?

27. Clause 602.215(1) requires that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted. The Tribunal must have regard to whether the applicant has complied substantially with the conditions of the last held Substantive visa or any subsequent Bridging visa, as well as the applicant's intention to comply with the conditions to which the Subclass 602 visa would be subject and any other relevant matter. This requirement will not apply if the applicant is medically unfit to depart Australia as described in cl 602.212(6). As set out above, the applicant does not meet the criteria in cl 602.212(6).
28. The basis of the applicant's claim to meet the criteria in cl 602.212(2) to be granted a Medical Treatment visa is on the basis that he seeks to obtain medical treatment for mental health issues associated with depression and anxiety as set out in the reports from Dr Abu-Arab.
29. The Tribunal has significant concerns as to the assessment by Dr Abu-Arab of any medical condition suffered by the applicant. Dr Abu-Arab appears to accept uncritically the claims made by the applicant as to the basis for any mental health issues he claims to be suffering from. In the report dated 7 December 2018, Dr Abu-Arab refers to the claims made by the applicant that the applicant played a significant emotional and psychological support for his wife. It was reported that they intend to continue to live together. It was reported that one of the concerns the applicant had, causing his depression, was the inability of his wife to safely live with him in Egypt while any offshore application was being processed. The applicant's relationship with his wife and her child are repeated in the report from Dr Abu-Arab dated 1 April 2019. No mention is made in that report that the applicant's relationship with the sponsor of his Partner visa had ended.

30. These claims are inconsistent with the information provided by the applicant. He said that he had not been living on a permanent basis with his wife since 2015. At most, she would spend two or three days in the home where he was living. He claimed that he was not aware that his wife was addicted to drugs and alcohol and had been admitted to hospital on occasions. He claimed that he stopped having any physical contact with his wife in 2018 after the family who he was living with said they did not trust her and stopped her from coming to the home where he was living. This does not indicate somebody who was providing significant emotional or physical support to his wife or was aware of her circumstances. The fact that Dr Abu-Arab based the claimed co-dependence of the applicant and his wife as a reason for the claimed depression suffered by the applicant undermines this assessment.
31. Dr Abu-Arab refers to the fact that the applicant required continuing medical treatment. It is noted that, in his reports, Dr Abu-Arab gives no indication as to the actual treatment he has given the applicant including the number of consultations the applicant had with him or any success in the claimed treatment. Despite the application being made for the Medical Treatment visa, the applicant appears to have made little attempt to obtain medical treatment from Dr Abu-Arab or any other health professional.
32. The applicant stated that he had not seen any health professional in 2020 until after the Tribunal invited him to a hearing. He made an appointment to see Dr Abu-Arab on one occasion after that date, with that appointment seemingly to be solely for the purpose of obtaining a report for the purpose of the hearing. Although the applicant claimed that he had made a further appointment to see Dr Abu-Arab at the end of August, there is no information to confirm this.
33. In his most recent report, Dr Abu-Arab refers to the death of the applicant's father in December 2020 as causing the applicant increased stress. Despite Dr Abu-Arab claiming this had exacerbated the applicant's depression, the applicant did not seek any medical treatment at that time and, as indicated above, only consulted Dr Abu-Arab after the Tribunal had invited him to attend the hearing. As indicated above, the report from Dr Abu-Arab does not provide any indication that the applicant had arranged for further consultations with him or any other health provider and does not give any indication that anything that Dr Abu-Arab or any other health provider has provided gave any assistance to the applicant.
34. The applicant claimed that he had been unable to make appointments to see Dr Abu-Arab or any other health provider due to the coronavirus shutdown. The Tribunal does not accept this. Although there were periods when state officials restricted movement within states, this did not prevent people from obtaining appropriate medical treatment if required. The periods that the government in New South Wales has restricted movement has been relatively short. There is nothing to indicate that the applicant made any attempt to obtain medical treatment during the extended periods of time when there have been no restrictions on movement for people living in New South Wales or their ability to consult a medical treatment provider. The Tribunal does not accept that the coronavirus pandemic has in any way prevented the applicant obtaining medical treatment if that was his genuine purpose for remaining in Australia.
35. The fact that since making the application for the Medical Treatment visa the applicant has obtained little in the way of any medical treatment undermines the claims that he genuinely intends to remain temporarily in Australia for the purpose for which the visa is granted.
36. The applicant stated that he had been so sick that he was unable to obtain medical treatment. This is despite the fact that the applicant acknowledged that he had been working for most of the time since applying for the Medical Treatment visa and being awarded certificates for the quality of his work. The Tribunal does not accept that if he was so sick that he could not obtain medical treatment he would have continued to have worked. The

Tribunal does not accept that if the applicant genuinely intended to stay temporarily in Australia for the purpose for which the Medical Treatment visa is granted that he would have been able to work.

37. The applicant claimed that by working he was being treated for his depression. He said that 'work itself is a treatment'. He said that he was not able to obtain work in Egypt and so he could not return to Egypt. He said that if he returned to Egypt he would not be able to pay off his debts. He claimed that by working this reduced his anxiety.
38. The applicant's clear statement is that the reason he wishes to remain in Australia is to be able to obtain employment. He has not sought medical treatment for any mental health or any other medical condition over the last 12 months. He only consulted Dr Abu-Arab immediately before the Tribunal hearing and as a result of the hearing invitation. Although claiming he has an appointment to see Dr Abu-Arab in August 2021, there is no information to support this and it is not referred to in the report from Dr Abu-Arab apart from his saying that he would 'benefit from further treatment'.
39. The applicant's immigration history shows a clear indication that he is determined to remain in Australia. His application for a Protection visa was shown to have no merit. His application for a Partner visa was refused. The Tribunal has significant concerns as to whether he was ever in a genuine relationship with his former wife, however, it is clear, based on the evidence of the applicant, that he was no longer living with his sponsor in a genuine and continuing relationship from 2015 at the latest. The applicant has not applied for any other visa to be able to reside in Australia and it does not appear that he is eligible to apply for any such visa. The applicant has not sought or obtained any medical treatment for any condition he may be suffering from over the last 12 months apart from immediately before the Tribunal hearing.
40. If the applicant did require any medical treatment, there is nothing to indicate that the applicant would not be able to consult an appropriately qualified medical practitioner in Egypt for any treatment there. As the applicant has been able to work and function at a high standard in his work, there is nothing to indicate that he would not be able to return to Egypt and continue working if he can find employment.
41. In all the circumstances, the Tribunal is not satisfied that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted. The Tribunal finds that the applicant is not seeking any medical treatment in Australia and is simply applying for the visa to be able to extend the time that he may reside and work in Australia and has not and will not be genuinely seeking any medical treatment.
42. Given the above findings, cl 602.215 is not met.
43. Based on the findings above, the applicant does not meet the requirements for the grant of the visa. The decision under review must be affirmed.

DECISION

44. The Tribunal affirms the decision not to grant the applicant a Medical Treatment (Visitor) (Class UB) visa.

Hugh Sanderson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 2

602.212 (1) The requirements in one of subclauses (2) to (8) are met.

Medical treatment

- (2) All of the following requirements are met:
- (a) the applicant seeks to obtain medical treatment (including consultation), other than treatment for the purposes of surrogate motherhood, in Australia;
 - (b) arrangements have been concluded to carry out the treatment;
 - (c) if the treatment is an organ transplant:
 - (i) the donor of the relevant organ is accompanying the applicant to Australia; or
 - (ii) all requisite arrangements to effect the donation of the organ have been concluded in Australia;
 - (d) the applicant is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community;
 - (e) arrangements have been concluded for the payment of all costs related to the treatment and all other expenses of the applicant's stay in Australia, including the expenses of any person accompanying the applicant;
 - (f) either:
 - (i) the payment of those costs will not be a charge on the Commonwealth, a State, a Territory or a public authority in Australia; or
 - (ii) evidence is produced that the relevant government authority has approved the payment of those costs.

Organ donor

- (3) All of the following requirements are met:
- (a) the applicant seeks to donate an organ for transplant in Australia;
 - (b) if the organ recipient is also an applicant, the requirements described in subclause (2) are met in relation to the organ recipient;
 - (c) the applicant satisfies public interest criterion 4005;
 - (d) arrangements have been concluded for the payment of all costs related to the organ transplant and all other expenses of the applicant's stay in Australia, including the expenses of any person accompanying the applicant;
 - (e) either:
 - (i) the payment of those costs will not be a charge on the Commonwealth, a State, a Territory or a public authority in Australia; or
 - (ii) evidence is produced that the relevant government authority has approved the payment of those costs.

Support person

- (4) All of the following requirements are met:
- (a) the applicant seeks to give emotional and other support to an applicant in relation to whom:
 - (i) the requirements described in subclause (2) or (3) are met; or
 - (ii) the requirements described in subclause 675.212(2) or (3) are met; or
 - (iii) the requirements described in subclause 685.212(2) or (3) are met;
 - (b) the person to whom the applicant is to provide support holds:
 - (i) a Subclass 602 visa on the basis that the requirements described in subclause (2) or (3) have been met; or
 - (ii) a Subclass 675 (Medical Treatment (Short Stay)) visa on the basis that the requirements described in subclause 675.212(2) or (3) have been met; or
 - (iii) a Subclass 685 (Medical Treatment (Long Stay)) visa on the basis that the requirements described in subclause 685.212(2) or (3) have been met;
 - (c) the applicant satisfies public interest criterion 4005.

Western Province of Papua New Guinea

- (5) All of the following requirements are met:
- (a) the applicant is a citizen of Papua New Guinea;
 - (b) the applicant resides in the Western Province of Papua New Guinea;
 - (c) the Department of the government of Queensland that is responsible for health has approved the medical evacuation of the applicant to, or treatment of the applicant in, a hospital in Queensland.

Unfit to depart

- (6) All of the following requirements are met:
- (a) the applicant is in Australia;
 - (b) the applicant has turned 50;
 - (c) the applicant has applied for a permanent visa while in Australia;
 - (d) the applicant appears to have met all the criteria for the grant of that visa, other than public interest criteria related to health;
 - (e) the applicant has been refused the visa;
 - (f) the applicant is medically unfit to depart Australia due to a permanent or deteriorating disease or health condition, as evidenced by a written statement to that effect from a Medical Officer of the Commonwealth.

Financial hardship

- (7) All of the following requirements are met:
- (a) one of the following applies:
 - (i) the requirements described in paragraphs (2)(a) to (c) are met in relation to the applicant;
 - (ii) the requirements described in paragraphs (3)(a) and (b) are met in relation to the applicant;
 - (iii) the requirements described in paragraphs (4)(a) and (b) are met in relation to the applicant;
 - (iv) the requirements described in subclause (5) are met in relation to the applicant;
 - (v) the requirements described in paragraphs (6)(a) to (e) are met in relation to the applicant;
 - (b) the applicant is in Australia;
 - (c) the applicant holds:
 - (i) a Subclass 602 visa; or
 - (ii) a Subclass 675 (Medical Treatment (Short Stay)) visa; or
 - (iii) a Subclass 685 (Medical Treatment (Long Stay)) visa;
 - (d) the applicant is suffering financial hardship as a result of changes in the applicant's circumstances after entering Australia;
 - (e) the applicant, or a member of the applicant's immediate family, is likely to become a charge on the Commonwealth, a State, a Territory or a public authority in Australia;
 - (f) the applicant, or a member of the applicant's immediate family, cannot leave Australia for reasons beyond his or her control;
 - (g) the applicant has compelling personal reasons to work in Australia;
 - (h) the applicant satisfies public interest criterion 4005.

Compelling personal reasons

- (8) All of the following requirements are met:
- (a) one of the following applies:
 - (i) the requirements described in paragraphs (2)(a) to (c) are met in relation to the applicant;
 - (ii) the requirements described in paragraphs (3)(a) and (b) are met in relation to the applicant;
 - (iii) the requirements described in paragraphs (4)(a) and (b) are met in relation to the applicant;
 - (iv) the requirements described in subclause (5) are met in relation to the applicant;
 - (v) the requirements described in paragraphs (6)(a) to (e) are met in relation to the applicant;
 - (b) the applicant is in Australia;
 - (c) the applicant has compelling personal reasons for the grant of the visa;
 - (d) the applicant satisfies public interest criterion 4005, other than paragraph 4005(1)(c).